



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of
REBECCA F. BOUGHTON TRUST 1, 11, and 111,
ETC., AND REBECCA F. BOUGHTON TRUST 5, 6,
and 7, ETC.

Appearances:

For Appellants: Victor L. Walch
Attorney at Law

For Respondent: Richard C. Creeggan
Counsel

O P I N I O N

These appeals are made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Rebecca F. Boughton Trust 1, 11, and 111, Melvin H. Mann, Trustee, against a proposed assessment of additional personal income tax in the amount of \$557.27 for the year ended October 31, 1967, and from the action of the Franchise Tax Board on the protest of Rebecca F. Boughton Trust 5, 6, and 7, Melvin H. Mann, Trustee, against a proposed assessment of additional personal income tax in the amount of \$10.97 for the year ended April 30, 1969.

Appellants filed separate appeals from respondent's actions denying their protests against proposed assessments of additional personal income tax. The two appeals involve identical issues of fact and share a common question of law. Accordingly, in order to facilitate these proceedings, the two appeals have been consolidated.

Appeals of Rebecca F. Boughton Trust I.,
11, and 111, Etc., and Rebecca F. Boughton
Trust 5, 6, and 7, Etc.

Rebecca F. Boughton as trustor executed an irrevocable declaration of trust on November 21, 1947, naming Melvin H. Mann as trustee and her three daughters as beneficiaries. On May 6, 1958, she executed a similar document. For our purposes the instruments are identical and we will speak of them as one.

The trust estate consisted of an undivided one-fifth interest in the trustor's undistributed share of an estate. Article I of the trust instrument directed that the trust estate be divided into three "divisions", one for each beneficiary. The income from each division was to be distributed to the beneficiary for life. Should any beneficiary die before the termination of the trust, income was to be distributed equally among the beneficiary's lineal descendants. If a beneficiary died during the term of the trust with no issue surviving the income from her division was to be distributed pro rata to the remaining beneficiaries. The trust instrument authorized the trustee, in his sole discretion, "to defer such division, and maintain and administer the trust estate as a unit" until ultimate distribution. However, in such an event separate accounts were to be kept for each beneficiary to which appropriate "undivided interests" in the trust estate were to be assigned.

In Article II the trust instrument provides for the termination of the trust upon the death of the last survivor of the three beneficiaries or two years after the trustor's death, whichever period is longer.

Article III provides that upon the termination of the trust the trust estate shall be distributed equally to the trustor's living grandchildren or to their issue if deceased. If none of the above are living, then the trust estate is to be distributed to the heirs of each of the beneficiaries in equal parts.

Throughout its sixteen pages the trust instrument speaks of "this trust" or "the trust". Except for a lone reference to "his trust" in Article XI the language of the trust instrument indicates that only a single trust was created.

Appeals of Rebecca F. Boughton Trust 1,
11, and 111, Etc., and Rebecca F. Boughton
Trust 5, 6, and 7, Etc.

For the taxable year ended October 31, 1967, the trustee filed three income tax returns for Trust 1, 11, and 311 and for the taxable year ended April 30, 1969, he filed three returns for Trust 5, 6, and 7 on the theory that each instrument created multiple trusts. Respondent determined that but a single trust was created by each instrument and that all of the income from each trust was reportable in a single return for each year. Due to the graduated tax rate and the allowance of only a single exemption for each trust additional tax liability resulted, notices of proposed assessment were issued, and in due course, this appeal followed,

With this factual background we are asked to determine whether the trustor created a single trust with multiple beneficiaries or multiple trusts.

A trust instrument may create a single trust with multiple beneficiaries (Hale v. Dominion National Bank, 186 F.2d 374, cert. denied, 342 U.S. 821 [96 L. Ed. 621]) or it may create multiple trusts. (U.S. Trust Co. v. Commissioner, 296 U.S. 481 [80 L. Ed. 340].) In resolving the issue the intent of the trustor as expressed in the trust instrument is controlling. (Wells Fargo Bank, etc. v. Superior Court, 32 Cal. 2d 1, 10 [93 P.2d 721]; Huntington National Bank v. Commissioner, 90 F.2d 876, 878.)

It has consistently been held that but a single trust has been created where the instrument consistently referred to the trust as one (See, e.g., Hale v. Dominion National Bank, supra; Fort Worth National Bank v. United States, 137 F. Supp. 71; Tom R. Booth Trust, T.C. Memo., September 27, 1963; Appeal of E. J. McGah Trust, Gus J. Souza, Trustee, Cal. St., Bd. of Equal., Oct. 6, 1966.) and where the individual shares or divisions are not completely isolated and independent in composition, in beneficiary, and in duration. (See, e.g., Fort Worth National Bank v. United States, supra; Appeal of E. J. McGah Trust, Gus J. Souza, Trustee, supra; cf. McHarg v. Fitzpatrick, 210 F.2d 792, 795.)

In the instant case the trustor consistently referred to her creation in the singular as "this trust" or "the trust". While terminology is not conclusive, in

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11, and 111, Etc., and Rebecca F. Boughton
Trust 5, 6, and 7, Etc.

view of such singular and oft-repeated designation indication of a contrary intent must be clear. (Hale v. Dominion National Bank, supra, 186 F.2d 374 at p. 375,) In support of such contrary intent we are told by the trustee that the trustor intended to create separate trusts because the financial circumstances and family responsibilities of the three beneficiaries varied considerably. This is, of course, a common cause for the use of the trust device with substantial discretionary powers granted to the trustee in order to ensure equitable treatment of the beneficiaries. However, it is not a particularly persuasive reason that multiple trusts rather than a single trust with multiple beneficiaries was created. In any event, while the practical interpretation placed upon the instrument by the trustee is of importance it is the intent expressed in the instrument which is controlling and not the belief or desire of the trustor about what she created. (McHarg v. Fitzpatrick, supra, 210 F.2d at p. 795.)

Further analysis indicates that the actions of the trustee do not comport with that standard requiring scrupulous attention to separate maintenance and administration of each trust which distinguishes multiple trusts from a single trust with multiple beneficiaries created by a single instrument.. (See Estelle Morris Trusts, 51 T.C. 20, 36 aff'd per curiam, 427 F.2d 1361; Sence v. United States, 394 F.2d 842.) The trustee did maintain separate bank accounts for each of the "divisions" and did file separate income tax returns for Trust 1, 11, and 111. However, prior to the year ended April 30, 1969, he failed to file separate state income tax returns for Trust 5, 6, and 7 because, we are told, there were no significant tax consequences flowing therefrom. In view of the benefit accruing to the trust, generally, the trustee's filing of separate returns can be expected and is of little moment in ascertaining whether a single trust or multiple trusts were created. (Appeal of Samuel Greenberg, Trustee, Cal. St. Bd. of Equal., Aug. 7, 1963.) However it is persuasive that the trustee did not see fit to file separate returns for Trust 5, 6, and 7 although the creating instruments contained practically identical provisions merely because there were no significant tax consequences. In the final analysis the words and actions

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Trust 5, 6, and 7, Etc.,

of the trustee do not clearly indicate that, notwithstanding the overwhelming use of singular terminology, the intent of the trustor was to create multiple trusts.

Appellant also argues that the provision for the division of the trust estate into three divisions contained in Article I of the trust instrument was, in reality, the creation of separate trusts. We do not agree. The separation of a trust into "divisions" without more does not demonstrate that separate trusts are created. (Hale v. Somniona National Bank, *supra*.) It is indicated where each "division" during the entire period of its existence in trust is as completely isolated from all other "divisions" in composition, in beneficiary, and in duration, as though they had each been created by separate instruments. (McHarg v. Fitzpatrick, *supra*; Appeal of E. J. McGah Trust, Gus J. Souza, Trustee, *supra*.) Conversely, a single trust is indicated where the divisions are not completely isolated and independent. (Fort Worth National Bank v. United States, *supra*; Appeal of E. J. McGah Trust, Gus J. Souza, Trustee, *supra*.)

The test announced by the court in McHarg has been interpreted by the court in Fort Worth where it was stated:

(T)he mere fact that there is a possibility that a portion of the interest of a deceased beneficiary may be received by someone other than a beneficiary or that some of the original beneficiaries possibly may not receive a part of another beneficiary's interest in trust is not decisive. The proper test is whether there is a possibility that a beneficiary may receive in trust a portion of the 'share' of a deceased beneficiary, not that such must be an absolute certainty. [Emphasis in original.] Fort Worth National Bank v. United States, *supra*, 137 F. Supp. at p. 75.)

Under the terms of the trust instrument before us each division has a contingent interest in the other divisions, in trust, and the duration of all divisions is determined by the life of the longest living beneficiary.

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Appellant argues that the recent case of Commercial Bank at Winter Park v. United States, 450 F.2d 330, limited the effect of McHarg by holding that the test had been applied too broadly. However, the Winter Park case merely reiterated the holding of McHarg that the independence and determinancy of the separate divisions was only one factor to be considered in evaluating the trustor's intention,

We are not unmindful of appellant's pervading argument that neither the use of singular terminology throughout the instrument nor the independence and determinancy of the various divisions, standing alone, are controlling factors. However, when both factors are present, as illustrated here, the inevitable conclusion is that but a single trust with multiple beneficiaries was intended by the trustor. Accordingly, respondent's action must be sustained.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code that the actions of the Franchise Tax Board on the protest of Rebecca F. Boughton Trust 1, 11, and 111, Melvin H. Mann, Trustee, against a proposed assessment of additional personal income tax in the amount of \$557.27 for the year ended October 31, 1967, and on the protest of Rebecca F. Boughton Trust 5, 6, and 7, Melvin H. Mann, Trustee, against a proposed assessment of additional personal income tax in the amount of \$10.97 for the year ended April 30, 1969, be and the same are hereby sustained.

Done at Sacramento, California, this 14th day of November, 1972, by the State Board of Equalization.

John W. Lynch, Chairman
Paul H. Ford, Member
George H. Hickey, Member
William C. Berglund, Member
_____, Member

ATTEST: W. W. Lumb, Secretary